SUPREME COURT OF THE UNITED STATES.

William Dugald Stuart, an alien, a subject of the Queen of Great Britain, residing in London, England,

vs.

The City of Easton and County of Northampton, corporations of the State of Pennsylvania, citizens of said State and residents of the Eastern District thereof.

October Term, 1894.

No. 151.

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William Dugald Stuart, substituted plaintiff in the above cause, respectfully represents that William Stuart commenced an action of ejectment against the above-named defendants in the Circuit Court of the United States for the Eastern District of Pennsylvania, to April Sessions, 1888, No. 51.

That said action was proceeded with to trial, and resulted in a binding instruction by the court to the jury to find a verdict for the defendant, and thereupon the said William Stuart sued out a writ of error to your Honorable Court, which, on or about the fifteenth day of January, 1895, as of the above term and number, was called for argument.

When the said case was being argued it appeared that the pleadings were defective in that the said William Stuart was described as a "citizen of London, England," and not as an alien. Upon this defect being suggested your Honorable Court directed the argument to proceed, stating that if it was found that this defect was fatal to the cause the same might be

returned to the Circuit Court for amendment, and immediately returned to your Honorable Court after the amendment had been made, and might then be heard upon briefs without further oral argument as a case partly heard, and thereupon the argument was proceeded with and concluded.

Subsequently your Honorable Court reversed the said cause solely upon the ground of alienage, at the costs of the plaintiff in error, with leave to amend the record in the court below.

Subsequently, to wit, upon the third and fourth days of April, 1895, the pleadings in the said cause having been duly amended so as to show the alienage of the plaintiff and the citizenship of the defendants, the cause came on before his Honor Judge Dallas and a jury for trial.

Whereupon the said cause was tried upon precisely the same evidence and with precisely the same rulings as were had upon the former trial, his Honor Judge Dallas being of the opinion that it would facilitate the speedy determination of the cause that the same rulings should be made as had already been made in 1888, and thereupon a bill of exceptions similar to the one sealed in the year 1888 was duly sealed in the said cause.

The question in the case turned upon the right of the descendants of William Penn, the original proprietor of Pennsylvania, to recover a square of ground in the city of Easton, conveyed September 28th, 1764, by the then proprietaries to certain trustees, "Their heirs and assigns forever In Trust, nevertheless to and for the Erecting thereon a Court House for the public Use and Service of the said County and to and for no other Use Intent or Purpose whatsoever"

The circuit judge withdrew the case from the jury, saying:—

"It does seem to me that on the face of this deed to these trustees it was not for their own use and benefit, but for the use and benefit of the people of Northampton County in the erection and use of public buildings. It is therefore a trust, it seems to me, and the plaintiff has no interest in this question whatever.

"If this land had been diverted to any other purpose than the one named in the deed it does not affect his interest in any way, but affects only those for whose use the conveyance was made, and he has, therefore, no right to maintain any action of ejectment for the recovery of this land on the ground that it was not conveyed irrevocably by the deed from the Penns.

"I therefore instruct you that such is the effect of the conveyance and the plaintiff is not entitled to maintain this action, and your verdict should therefore be for the defendant."

This instruction was affirmed in the opinion filed in the Circuit Court of Appeals, namely, that in a deed wherein the *habendum* contained the above clause a trust in fee was created.

It was contended in the Circuit Court of Appeals and is urged here that this is a new rule in the law of real property, and amounts to saying that where property is conveyed to public use the grantor cannot limit the quantity of the estate granted.

Up to the time of this decision it had been held in Pennsylvania and elsewhere that a grant to A. and his heirs "for a certain use and for no other use" created a conditional or base fee whether A. was an individual, a trustee or a charity, and at least two cases to this effect had been decided in Pennsylvania, namely:—

Kirk *vs.* King, 3 Pa., 436;

Sheetz *vs.* Fitzwater, 5 Pa., 126.

These cases have never been reversed, but have, on the contrary, been affirmed and referred to as settling the law there.

Church *vs.* Public Ground Co., 103 Pa., 613;

Slegel *vs.* Lauer, 148 Pa., 236;

the last case being as late as 1892.

No attempt was made by the Circuit Court or the Appeal Court to distinguish or explain these cases, and it is strongly urged upon the court that the effect of this decision will be to unsettle titles in Pennsylvania and produce a conflict between the Federal and the State courts as to a rule in the law of real property wherein the Federal courts have always followed the *lex loci rei sitæ*.

Your petitioner files herewith, as required by Rule 37, a certified copy of the entire record of the case in the Circuit Court of Appeals, and respectfully shows that this cause has already been partly heard by your Honorable Court, and that the question involved is one of such gravity and importance as to justify an application to your Honorable Court to require the record of the said proceeding to be certified to the Supreme Court for its review and determination.

Your petitioner therefore prays that your Honorable Court will issue a writ of error according to the statute to the United States Circuit Court of Appeals for the Third Circuit to bring up the record of the said cause of Stuart *vs.* The City of Easton and County of Northampton, of September Term, 1895, No. 18, so that the same may be heard by your Honorable Court. And your petitioner will ever pray.

(Signed) WILLIAM DUGALD STUART,

By his Attorney in Fact,

(Signed) WM. BROOKE RAWLE.

STATE OF PENNSYLVANIA, }
CITY OF PHILADELPHIA, } *ss.*

William Brooke Rawle, attorney in fact of William Stuart, being duly sworn, deposes and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

Sworn to and subscribed before me, this day of , A. D. 1896.

ARGUMENT.

The question in the case is, whether the grant of September 28th, 1764, made by the proprietaries of Pennsylvania to John Jones and others in trust for the erecting a court house for the public use of Northampton County, *and for no other use, intent, or purpose whatsoever* (see Exhibit No. 4 of the Transcript of Record, page 16, for the deed in full), created a conditional estate or an unrestricted fee simple.

The conveyance by the proprietaries was upon a nominal consideration. They were willing to give their land for use as a court house, but not for any other purpose. They therefore expressly imposed that condition in their grant, and by the plainest language. They conveyed an estate by a grant which was to be commensurate in duration with the purpose to be answered by it. The grantees accepted the gift under and subject to the condition imposed. They held it upon that tenure. They have now definitely and irretrievably abandoned the purpose for which the lot was granted. Yet, notwithstanding, they seek to retain the gift, and, in opposition to the plain language of the grant, to claim that no restriction upon their rights exists; they claim an unfettered estate, with full power of perversion to any use, intent, or purpose they desire, and with full power of alienation; and while claiming the benefit of the grant to them, attempt to reject the conditions upon which that grant was made. They seek the benefit of the gift without its burdens. They invoke the aid of one part of the conveyance, viz., the premises, and they seek to reject another part thereof, viz, the *habendum*.

But, as was said by this court in Cowell *vs.* Springs Co., 100 U. S., 57, where an ejectment for a breach of a condition was sustained: "The answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. * * * The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter houses, soap factories, distilleries, livery

stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods."

And, as was further said by this court (100 U. S., page 61): "The grantee took his title from the company with a condition. * * * And he is therefore estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff or the validity of the title conveyed by its deed. Upon obvious principles he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it."

It is submitted:—

I. A conveyance for a specified purpose and for "no other use, intent, or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.

II. This rule of construction applies equally whether the conveyance is or is not to trustees or a charity.

I.

A conveyance for a specified purpose and "for no other use, intent, or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.

Grants similar to the present, to wit, for a particular purpose and "for no other use or purpose," have always been held in Pennsylvania to create conditional estates.

In *Kirk* vs. *King*, 3 *Penna. St. Rep.*, 436, a lot was granted to the employers of the school at Plumb Creek, to have and to

hold said lot for an English school house *and no other purpose* to them who now are or may hereafter be the employers of said school forever. In 1815 a school house was built upon said lot; in 1836 it was abandoned, and so continued until 1843, when the grantor entered for condition broken. Plaintiffs brought trespass. The court below took the same view that the court below in the present case did, but upon appeal the Supreme Court reversed, saying per Gibson, C. J.:—

"McElroy's conveyance to the employers of the school at Plumb Creek, being an unincorporated association, was void at law for want of a grantee capable of taking, and the legal title remained in the grantor, subject to the uses declared in the deed. * * * Second, the nature of their right depends on the terms of the agreement, which was to use the ground 'for an English school house *and for no other purpose.*' And that was the substantial consideration of the grant, the nominal consideration of fifty cents being expressed under some vague apprehension that it might be essential to the raising of a use; and *the grant itself was consequently on an implied condition or agreement that the school should be kept up.* The grantor certainly did not agree to part with his land without receiving the benefit promised in return for it. We must hold it to be commensurate in duration with the purpose to be answered by it; and the question is, was the school permanently abandoned. At the time of the defendant's entry it had been discontinued for the space of seven years, without any indication on the part of the employers of an intention to so use it, and this was certainly enough to raise a legal presumption of its abandonment. * * * It is not found that they require the ground for the use of a school, or that they intend to use it as such. The abandonment of the trust for seven years being irretrievable, the defendant, as the grantor's successor, had a right to enter and hold against all the world."

There is great similarity between that case and the present one.

1. The object of the deed was a school, as the object here was a court house.

2. There was but a nominal consideration, as here.

3. A trust was created, for though there the fee did not pass yet the court held the grantor was seized to the use or in trust for the school, as the trustees were here.

4. The court held the grantor seized of a trust upon condition that the school be kept up, as the trustees here hold upon condition that the court house be kept upon it.

5. The court held that the abandonment for seven years was irretrievable, and entitled the grantor's successor to re-enter and hold against the world.

This case in so far as it decided that a public school was not a charity has been dissented from, but in so far as it ruled the point for which it is here cited it has always been followed.

In *Sheetz* vs. *Fitzwater*, 5 Pa. St. Rep., 126, a grant was made of a mill dam, and also one perch of land on each side of said dam or pond, to and for the use and service of a certain mill, *and for no other use whatsoever*. The mill pond being subsequently drained and farmed, the grantee of the original grantor entered for condition broken, and trespass was brought against him. *Held*, he was entitled to re-enter.

Krause, P. J., in the court below, said: "Emlen did not convey a fee simple estate in that land; he conveyed a qualified fee, determinable on the abandonment of Lardner, his heirs or assigns, of the use and service for which the conveyance was made, as stated in the deed. And in conveying such limited fee he retained the reversion in himself, and that he could permit to descend or sell to others. To convey such limited fee and to retain the reversion was his intention, as the court collects it from his deed."

Among the errors assigned upon appeal was the construction of Emlen's deed. This was affirmed by the Supreme Court, who, in reversing upon another point not connected with this, said: "There is only one assignment of error in this record which is sustained, and the other points are left to stand on the reasons of the judge, which seem to be satisfactory."

See the question of the base fee discussed in the arguments of counsel.

These cases were decided in 1846 and 1847. They have been consistently followed in Pennsylvania. Thus, in *Methodist Church* vs. *Public Ground Co., 103 Pa. St. Rep., 613* (decided in 1883), the Supreme Court, in construing the agreement in that case, held, that as said covenant and agreement only referred to a certain use of the land "without other words," such covenant or agreement did not create an additional estate, but that if the words "and for no other purpose" had been superadded, the result would have been different. Thus the court said :—

"Did the writing create a conditional estate? It contained none of the technical terms usually employed for that purpose, neither '*sub-conditione, proviso,*' nor '*ita quod.*' It is true no one of these is essentially necessary to constitute a condition; other words clearly equivalent thereto are sufficient. Hence, an estate conveyed for '*an* English school house *and no other purpose*' was held in Kirk *vs.* King, 3 Pa. St. Rep., 436, to revert to the grantors after the school therein had been discontinued for seven years, so long as to create a presumption of permanent abandonment. So in Scheetz *vs.* Fitzwater, 5 *Id.*, 126, a conveyance of a mill dam or pond of water and mill race, and a perch of land on each side thereof, for the use and service of a certain mill, with the land thereunto belonging, '*and for no other use whatsoever,*' the title was held to be a base fee, determinable on disuse as a pond."

Accord, McKissick *vs.* Pickle, 16 Pa. St., 140;
Watters *vs.* Bredin, 70 *Id.*, 237.

The same doctrine was again affirmed in Pennsylvania, in
Slegel *vs.* Lauer, 148 Penna. St. Rep., 236,
decided in 1892, and the foregoing was approved. In this case plaintiff's predecessor in title, by deed dated December 1st, 1772, conveyed a strip of ground eight feet wide and two hundred and thirty feet long, adjoining the wall of the prison in Reading, Pa., to the commissioners of Berks County and their successors, "To and for the use, intent, and purposes following; that is to say, to be and remain forever hereafter unbuilt on in order to prevent any prisoner or prisoners making their escape

over the said prison wall by reason or means of any building to be erected contiguous to the same wall." In 1849 the prison was removed and the prison property sold. Plaintiff filed a bill to quiet the title of the eight feet adjoining the old prison wall on the ground that the fee conveyed to the commissioners was a base fee determinable upon cessation of the use of the property for that purpose, and a decree to that effect was entered. Endlich, J., whose opinion was adopted by the Supreme Court, says (148 Pa. St., 244): "The instrument under consideration is, therefore, to be treated precisely as if it contained a declaration that the grant was for the purpose mentioned and no other. But where an estate is conveyed in fee for a specified purpose '*and no other*,' the fee is a base fee determinable upon cessation of the use of the property for that purpose; Kirk *vs.* King, 3 Pa., 436; Sheetz *vs.* Fitzwater, 5 *Id.*, 126."

Hence when a grant is made for a particular purpose, and when to that purpose is superadded the words "and for no other purpose," or "for no other purpose whatsoever," the grantee's estate is conditional, and upon the cessation of the use the grantor may enter for condition broken.

Of course, the mere expression of a purpose will not of or by itself create a condition, particularly when that purpose is one disclosed by a separate instrument. Thus a grant in fee simple to county commissioners, "in trust and for the use of the inhabitants of Delaware County to accommodate the public service of Delaware County," was held not to create a base fee. In this case the conveyance was for a valuable consideration and a separate declaration of trust was executed by the trustees. The court, in its opinion, said: "Had the ancestor of the plaintiffs conveyed the property as a gratuity to be used in a particular way they might have had a plausible case on the cessation of the user."

Kerlin *vs.* Campbell, 15 Pa. St., 500.

So also a grant to the county commissioners of Union County, Pennsylvania, and their successors in office, of a tract

of land with a brick court house then erected upon it, "in trust for the use of the county in fee simple," was held to create a fee simple.

Seebold *vs.* Shitler, 34 Pa. St., 133.

Similarly a devise of land to a religious body in fee, "there to build a meeting house upon," &c., was held to pass a fee.

Griffiths *vs.* Cope, 17 Pa. St., 96.

Judge Rogers here distinguishes between cases where the grant is in fee for a certain purpose without more, and those where it appears that the estate ends when the use is abandoned. So a grant to a congregation "for the benefit, use, and behoof of the poor of said * * * congregation * * * forever," and "for a place to erect a house of religious worship for the use and service of said congregation, and if occasion require a place to bury their dead" (Brendle *vs.* German Reformed Congregation, 33 Pa., 415), was held to pass a fee simple.

These cases obviously have no application to the present case.

It is unnecessary to add that decisions are not pertinent which relate to the construction of deeds upon mere recitals that the grant is upon a certain consideration, or where the covenants are collateral or in another instrument. As in—

Cook *vs.* Trimble, 9 Watts, 15;
Union Canal Co. *vs.* Young, 1 Watts, 410;
Perry *vs.* Scott, 51 Pa. St., 119;
Church *vs.* Pub. Ground Co., 103 Pa. St., 608.

This case differs also from the cases where a fee is vested in trustees without limitation, and then a purpose is suggested, either collaterally or in other than the granting clause of the deed, as in Barr *vs.* Weld, 24 Pa. St., 84, where a conveyance was to trustees and to their successors forever in trust for the district formerly called Utica School District, without even a direction to erect a school upon it.

Nor is the present the case of a charitable use, or one for the

application of the *cy pres* doctrine, where the court construes a primary charitable intention, as in—

Wright *vs.* Linn, 9 Pa. St., 433;

In re Mercer Home, 162 Pa. St., 232.

Every case cited by the Court of Appeals is either one of dedication wherein the trust is sought to be enforced, or goes simply to the point, that a grant in trust for a specified purpose, without more, does not of itself raise a technical condition—that such form of grant does not so negative other uses as to raise a conditional fee—that the grant is construed as a covenant or as a mere recital of purposes, and particularly so in case of charitable uses.

Taking the cases cited by the learned judge of the Court of Appeals in his opinion in their order:—

In Wright *vs.* Linn, 9 Pa., 433, the gift was to trustees to erect a school for the perpetual use of parties and the inhabitants who might reside nearer this school than any other.

In McKissick *vs.* Pickle, 16 Pa., 140, the grant was to trustees for a school or church with an express clause of re-entry. This right of re-entry was strictly construed, but that it created a conditional estate was expressly admitted.

In Griffith *vs.* Cope, 17 Pa., 96, the grant was to a religious body to build a meeting house upon.

In Barr *vs.* Weld, 24 Pa., 84, the grant was to trustees in trust for a school district without even a direction to build a school house upon the land.

In re Mercer Home, 162 Pa., 232, a devise of property providing that no part should be disposed of for any other use than as a home, it was held not to prevent a sale of a small portion where the funds were to be used for the same purpose, the court especially distinguishing that case from this line of cases in its opinion by saying:—

"Nothing short of a plain, unequivocal direction that no part of the land shall be parted with for any purpose whatever ought to be held sufficient to restrain the managers from doing that which the interests of the charity under their control required of them."

But on the other hand, as between the grantor and the grantee, when to the purpose specified in the grant there is expressly superadded the condition that the grant shall be "for no other use, intent, or purpose whatsoever," then technical words of condition *are* used and a conditional estate is created by the grant, such construction being a rule of property in Pennsylvania.

Kirk *vs.* King, 3 Pa., 436;
Scheetz *vs.* Fitzwater, 5 Pa., 126;
Church *vs.* Public Ground Co., 103 Pa., 613;
Slegle *vs.* Lauer, 148 Pa., 244.

The learned judge does not cite any case, whether for charitable purposes or otherwise, wherein these words were used in which a contrary doctrine was asserted. We may presume such cases do not exist.

In *Stuyvesant* vs. *The Mayor of New York City, 11 Paige, Ct., 427*, the same doctrine was applied where land was granted to New York City "upon the express condition that such lands shall at all times and forever thereafter be appropriated to and used for the purposes of a public square." Here the intention was clear that the purpose for which the land was granted was for a square only. *Held*, a condition, and that the grantor might file a bill to enforce the grant or enter for condition broken.

O'Brien *vs.* Wetherill, 14 Kan., 616;
Cowell *vs.* Springs Co., 3 Col., 82;
Collins Co. *vs.* Marcy, 25 Conn., 242;
Plumb *vs.* Tubbs, 44 N. Y., 442;
Cowell *vs.* Springs Co., 100 U. S., 55.

So, in Church *vs.* Grant, 1 Lead. Cases Am. Law, Real Property, page 173, Bigelow, J., says:—

"There is a further distinction in the nature of estates on condition. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect is reserved to the grantor and his heirs only,

which gives them the right to enter as of their old estate upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate."

And such possibility of reverter passes to the grantor's heirs.

Scheetz *vs.* Fitzpatrick, 5 Pa. St., 245.

II.

This rule of construction applies equally whether the conveyance is or is not to trustees or to a charity.

The court below seemed to consider that because the conveyance was to trustees the ordinary rule of construction was altered. It is submitted that no such distinction exists. There is no reason for such distinction. The *grantor's* reserved estate is the same whether the conveyance is to A. for his own use, for a specified purpose and for no other, or for the use of some one else for a specified purpose and for no other. In both cases the legal estate is in A., and the legal reservation to the grantor is the same. The words creating the condition are the same in either case. Hence the construction is the same.

The court below ignored the fact that the question at issue was the *grantor's* estate. It determined the question on doctrines solely applicable between trustee and *cestui que trust* in cases where the trustee improperly diverts the subject matter of the trust against the declared wishes of the *cestui que trust.*

Kirk *vs.* King, 3 Penna. St., 441, was the case of an equitable estate, for the conveyance, being to an unincorporated association, was void at law.

In *McKissick* vs. *Pickle, 16 Penna. St., 140,* a conveyance to certain persons, their heirs and assigns, *in trust* for the use of a school house, provided that if at any time thereafter the premises should be converted to any other use the lot should revert to the grantor and his heirs.

Here an express trust created in fee was held qualified by the *habendum* into an estate upon condition.

So in the second appeal of the case of McKissick *vs.* Pickle, 21 Penna. Rep., 232, the Supreme Court held that if the jury found that the trustees had for seven years permitted the property to be used as a dwelling house their conditional estate was determined and the grantor was entitled to recover for condition broken.

In Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a base fee, which terminated when the premises ceased to be used for the specified purpose.

The Court of Appeals decided that a gift to build a court house is a gift for charitable uses; that no conditional estate can be created where the land is to be devoted to charitable purposes, and that as there is no express clause in the deed reserving a right of entry the grantor cannot take advantage of breach of condition. While a gift for purpose of a court house may, perhaps, in a certain measure, be regarded as a charitable use, it is certainly not a charity in the broad sense of the word. Neither is a jail. Both are classed together in the Tax Acts, and are not exempted from taxation as being charities, but as being "public property used for public purposes."

But the question whether a court house is or is not a charity is wholly foreign to the present case. The question here presented is, does the grant create a conditional estate as between grantor and grantee? The construction of the words of the grant will be precisely the same whether the grantees hold for charitable uses or not. A grant of a conditional estate may be made to any one and for any lawful purpose, and it is immaterial whether the grantees take as trustees or in their own right; whether they take for a charity or for private ends; whether they take for public or for individual purposes.

A grantor has a perfect right to say that he will voluntarily give his property for a particular charitable use and for no other purpose, and that the land shall revert to him if that particular use is discontinued. The sole question in such case is, has the grantor so declared by the instrument containing his gift? The language of the present grant by the Pennsylvania rule of real property construction expressly so declares.

Hence the question in the present case is, do words which would undoubtedly create a conditional estate when applied to a grant for general purposes fail of their effect and bear some other construction because the grant is for a particular charitable or *quasi* charitable purpose? It is submitted that if the words used create a conditional estate, as they have always hitherto been decided to do, it is immaterial for what purpose the grantees are to hold the property. The distinction is accurately drawn in Barr *vs.* Weld, 24 Pa., 86, where there were no words creating a condition.

And in Pennsylvania conditional estates and rights of entry for breach thereof exist without the reservation of specific clauses of entry.

Kirk *vs.* King, 3 Pa., 436;
Sheetz *vs.* Fitzwater, 5 Pa., 126;
Church *vs.* Public Ground Co., 103 Pa.;
Courtney *vs.* Kellar, 4 Pennypacker, 38;
Slegle *vs.* Lauer, 148 Pa. State, 236.

The defendants in error in their brief state that Kirk *vs.* King, 3 Pa. St., 436, was overruled by Wright *vs.* Lind, 9 Pa. St., 433. This is an error. A reference to the decisions themselves proves the contrary, and upon the point of construction of the words of grant, Kirk *vs.* King has always been recognized as sound law, even as late as 1892. See—

Methodist Church *vs.* Public Ground Co., 103 Pa. St., at page 613;
Slegle *vs.* Lauer, 148 Pa. St., at page 244.

Moreover, in the present case the trustees were in reality the county, and by Act of Assembly of 1834 the title was expressly vested in the county.

Act of 15th April, 1834, P. L., 538, sections 3 and 9;
1 Purdon (12th ed.), page 436, pl. 12–18.

The condition was broken after the trustees' title had ceased, and when there was no equitable estate. The object of the original appointment of trustees was because the county did

not possess the corporate power of holding real estate in its own name. In early times counties had not full corporate powers, and in Pennsylvania, as in other States, all titles for the counties were taken by trustees; thus was title taken to Independence Square in Philadelphia and all court houses and prisons in Pennsylvania. See Act 18th February, 1780, 1 Smith's Laws, 484.

In speaking of the title thus taken by trustees, Ch. J. Shaw, in

Atty. Gen. vs. *Federal St. Meeting, 3 Gray (Mass.), 1,*

a case much like this, says: "Supposing, then, that most of the old societies of Boston were formed by association without any acts of incorporation, and there being no other body capable in law of taking and holding the fee and legal estate of the land to be used for a church edifice and its incidents, the natural expedient would present itself, when an agreement had been made by an unincorporated body of persons associated together to form a new religious society with the owner of the land for its purchase to take a deed to and for the use and benefit of the whole in the names of a few, who in their natural capacity could take and hold the legal estate in fee in trust for those who had thus associated to form such a society, and who had raised the money for that purpose. In such case the trustees would hold nearly the same relation to the pew holders, the contributors, and members of the society so associated as the corporation, whether of a territorial or poll parish, would hold to the members, the legal estate would be in the trustees, and the entire use and beneficial interest in the members of the society."

In that case the grant was to trustees, without words of inheritance, for the benefit of a congregation (according to the tenures of the Church of Scotland), to hold and enjoy the lands whereon the meeting houses are erected forever, and for no other use, intent, or purpose whatsoever.

Held, First.—As the trustees needed a fee, that such was granted.

Second.—That the trust changed by the change of form of worship of the congregation.

Third.—That as between the trustees and the congregation, after an occupation of forty years, the title was in the congregation.

In *Brendle* vs. *Congregation, 33 Pa. St., 415*, where a gift was to trustees "in trust for a place to erect a church and for a burial ground," it was held to vest an executed legal estate in the congregation itself.

LOWRIE, Ch. J.: "The use of the medium of trustees was mere matter of form, and does not at all make this case a charitable use. Such trustees seldom, if ever, convey to successors, but title in their name is treated as title of the congregation, to be used by the congregation at their discretion, as the law allows."

It was to obviate doubt as to the *status* of the estate of the county in such grants that the provisions of the Act of 1834 were suggested by the revisers of the Civil Code of Pennsylvania, who in their third report, dated December 31st, 1832, page 5, stated: "Whether they constitute a corporation remains unsettled as a general question. * * * We think that it will be found advantageous to declare every county and township a body corporate for certain purposes." And to effect this the revisers suggested the Act of 1834 which was subsequently passed by the legislature, as suggested by the revisers, and is as follows:—

"The titles to all and singular the court houses, jails, prisons, and workhouses, together with the lots of land thereunto belonging or appertaining, in the several counties in this State, as they now are, or heretofore have been, vested in any feoffees or trustees, or in the Commonwealth, or in the commissioners of the respective counties, or any bodies politic or corporate, for the several use of the said counties respectively, shall be, and they are hereby declared to be, vested in the respective counties for the use of the people thereof, and for no other use."

Act 15th April, 1834, section 9, P. L., 538; 1 Purdon's Digest (12th ed.), page 436, pl. 18.

In the present case the grant was as much to the county as it was possible to make it, and if the county had been capable of taking, and the grant had been to it, for the use of a court house and no other use, it would have been a condition. Can it be less if to a trustee in trust for such use?

But the question does not really arise. For the condition was violated and the land diverted to other uses by the county itself while holding the legal title long after the trustees' title had been abolished and the equitable estate merged into the legal title.

Hence the learned judge ruled the case upon an immaterial point, for at the time of condition broken no trust existed.

Again, from another standpoint, the same result is reached. It is a familiar and universal rule of construction that a trustee's title "is commensurate in duration with the purpose to be answered by it."

Kirk *vs.* King, 3 Penna. St., 441.

Or, as stated in Perry on Trusts:—

"The general rule is that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate to the execution of the trust, and no more and no less. Courts will abridge the estate where words of inheritance are used if the execution of the trust does not require a fee, and so they will enlarge the estate if no words of inheritance are used in a deed."

1 Perry on Trusts, section 320 (citing many cases).

So, again, in 1 Perry on Trusts, section 312, the same principle is thus stated:—

"The extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or

otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts: First, 'whenever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not;' and second, '*Although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires.*'"

1 Perry on Trusts, section 312 (citing many cases).

So in Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was made to trustees and their sucessors in trust to build a church "for the members of the Methodist Church, so long as they use it and no longer, and then to return back to the original owner;" and it was held that the trustees' estate terminated when the house ceased to be used as a place of worship according to the discipline of the Church.

In the present case the purpose to be answered by the trust is the use of the land for the use of a court house "for the public use and service of the said county, and to and for no other use, intent, or purpose whatever." That use has now definitely determined. For over thirty years the land has been abandoned for any such use. The court house building thereon erected has been torn down, removed, and permanently erected in another place. The purpose to be answered by the trustees' estate has ceased. Hence the trustees' estate also ceases.

Therefore, whether we consider the case as one of the *quantum* of the estate of the trustees, or as one of the *quantum* of the grantor's reservation, the same conclusion results. In either case the heirs of the grantor are entitled to recover.

Moreover, the construction for which we contend has been hitherto concurred in by the defendants. In 1703 a conveyance, similar to the one now in controversy, was made by

Richard and Thomas Penn. It was to trustees in trust for the county defendant for the purposes of a prison, "and for no other use whatever." (See Exhibit No. 11, Record, page 27.) The use of the lot for prison purposes was discontinued, and the county desired to acquire the fee simple, so that they could use the property for other purposes. Accordingly, in 1852, the county defendant bought from Granville and Richard Penn (the then heirs at law of the Penns), for a valuable consideration, their reversionary interest in the property, by deed reciting that "The county of Northampton is desirous of becoming the owners of the said lot of ground, with the appurtenances, in fee simple, to be by them occupied and enjoyed for all and every purpose whatsoever they may deem proper, and at pleasure to sell and convey the same free from all and every restriction, estate, and incumbrance whatever." If, as the defendants now contend, they are entitled under a similar conveyance to use the property for any purpose they may deem proper, and if, as they contend, the plaintiff has no reserved estate under such conveyance, why did the defendants purchase such title in 1852 from the plaintiff's ancestor, and recite that otherwise the property could not be perverted to other uses. This was a construction directly by the parties themselves of a similar conveyance under identical facts.

Evidence of these facts was offered at the trial, but rejected by the learned judge, and exceptions duly taken. The rejection of this evidence is embraced in the fourth assignment of error.

To show the interest this case has created counsel append an article that appeared in the American Law Register for June, 1896, vol. XXXV., N. S., page 402, with the preparation of which counsel had nothing to do, as follows:—

"Reverter of Land Granted for Special Purpose. *Stuart* vs. *City of Easton and County of Northampton*, June, 1896 (not yet reported), United States Circuit Court of Appeals for Third District.

"In 1764, Thomas Penn and Richard Penn conveyed 'a lot of ground unto AB. *et al.*, their heirs and assigns forever in trust nevertheless, to and for the erecting thereon a court

house for the public use and service of the said county, *and to and for no other use, intent or purpose whatsoever.*' The patent contains no punctuation. These trustees had been authorized in 1752 by an Act of Assembly 'to take assurances of a piece of land for the use of the inhabitants of said county, and thereon to erect a court house and prison,' &c.

"By virtue of an Act of Assembly of 1834 (P. L., 538), the title of the trustees became vested in the county of Northampton. A court house was erected upon the ground and remained there until 1862, when it was removed, and no other buildings have been erected thereon since. In 1888, the heir at law of the Penns made entry for breach of condition, and brought ejectment. The question arises, Does the patent of 1764 convey a fee simple absolute or an estate upon condition, a base fee?

"The learned court evaded this question by separately construing the premises and the *habendum*: 'The succeeding words in trust nevertheless to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent or purpose, whatsoever defined the relation between the grantees and the inhabitants of the county, and restrained the grantees from any other application of the property than to the avowed object of the grant.'

"Surely this is a strained construction; in none of the cases cited has it been even suggested. The court continues: 'In the absence, then, of express stipulation, is it to be supposed that the grant of a conditional estate, determinable by re-entry upon nonuser, was intended?' After the above disposition of a stipulation, which, in Pennsylvania, whose decisions the court is bound to follow in this case, has always been held to constitute a fee upon condition, the learned judge asks for an express stipulation.' The court was of opinion that the grant was a charitable use, and that in the absence of an express provision for a reverter to the grantors in the event of a misuser or nonuser, no right of entry to defeat such use was to be implied. The consideration of that question has no place in the decision of this case.

"It has never been disputed that a man may make such legal disposition of his property as he chooses, and when he has made such conveyance the courts are bound to effectually construe his deed. Fees upon condition have been recognized immemorially.

"It is settled that the mere expression in a conveyance of the purpose of a grant will not, of itself, create a condition: *Kerlin* vs. *Campbell*, 15 Pa., 500 (1850); *Seebold* vs. *Shittler*, 34 Pa., 133 (1859). A base fee may be created without the usual technical words, *sub conditione*, *proviso*, *ita quod*: *Church* vs. *Ground Co.*, 103 Pa., 613 (1883). Nor is an express stipulation that, upon breach of condition, the grantor may re-enter, necessary; it is implied as part of the grant: IV. Kent Com., 123; *Gray* vs. *Blanchard*, 8 Pick., 284; *Osgood* vs. *Abbott*, 58 Me., 80. Where conveyances in fee simple, stating the purpose of the grant, were made, with the superadded words, 'and for no other use whatsoever' (*Sheetz* vs. *Fitzwater*, 5 Pa., 126 (1847); 2 L. C. Am. R. P., 13), 'and no other purpose' (*Kirk* vs. *King*, 3 Pa., 436 (1846); *Crane* vs. *Hyde*, 135 Mass., 147), it was held that base fees were granted. In *Kirk* vs. *King* the conveyance was to a trustee. And as recently as 1892, in *Slegel* vs. *Lauer*, 148 Pa., 244, the Supreme Court, in a two line *per curiam* opinion, adopted the exhaustive opinion of Endlich, J., where a conveyance made to county commissioners for a specific purpose, without superadded words, was held to convey a fee upon condition, the use for the particular purpose constituting part of the consideration for the grant. The learned judge, in this case, said: 'But, where an estate is conveyed for a specific purpose, "and no other," the fee is a fee upon condition, determinable upon cessation of the use of the property for that purpose: *Kirk* vs. *King* (*supra*); *Sheetz* vs. *Fitzwater* (*supra*); *a fortiori* should the words '*to and for no other use intent or purpose whatsoever*' constitute a fee upon condition.'

"Agreeing with the learned judge that a grant for such a purpose might be a charitable use, it is submitted that the premises for such conclusion are wanting here. The conveyance to the trustees authorized by Act of Assembly to receive

such assurances was, in the language of Lowrie, C. J., in construing a similar deed to trustees in trust for a church congregation, 'mere matter of form,' and does not at all make this case a charitable use:' *Brendle* vs. *Congregation*, 33 Pa., 415 (1858). In that case the deed was held to vest an executed legal estate in the congregation. Moreover, in 1834, the trustees' title became vested in the county, and during its tenure of the qualified fee simple estate the breach of condition occurred. When the specified purpose of the grant ceases, the estate of the trustees cease: *McKissick* vs. *Pickle*, 21 Pa., 232 (1853); *Henderson* vs. *Hunter*, 59 Pa., 335 (1868). In the latter case, the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a fee upon condition, which terminated when the premises ceased to be used for the specified purpose. The same conclusion was reached in *Slegel* vs. *Lauer* (*supra*), where the conveyance in 1772 was to the commissioners, to and for the use, etc. Neither upon principle nor upon authority does the learned court's conclusion seem tenable.

"[It is a curious fact that in 1852, when these defendants removed from a lot granted by a similar patent for a prison, 'and for no other use whatever,' they purchased from the three heirs at law of the Penns their reversionary interest in the property.]"

C. BERKELEY TAYLOR,
A. T. FREEDLEY,
WM. BROOKE RAWLE,
For Plaintiffs in Error.

In addition to the cases in Pennsylvania which held that conveyances for particular purposes and for no other purposes create conditional estates, counsel have been able to find a number of cases in other States where the same rule has been applied.

Massachusetts.

In Esterbrook *vs.* Tillinghast, 5 Gray, 21.

Where a devise was made to defendant in trust that he and his successors should appropriate the income of the devised property to support the Gospel in a church at Swanzea of a certain faith so long as the members of said church should maintain the visibility of the church in such faith, the heirs of the devisor filed a bill for the recovery of the property, alleging that the visibility had not been maintained, and that by the statutes of Massachusetts the property was revested in them as heirs at law of the devisor, to which bill a demurrer was filed which the court subsequently overruled, Metcalf, J., saying:—

"He (the trustee) holds the property since the failure of the trust by the extinction of the *cestui que* trust not for his own benefit, but for the devisor's heirs at law as a resulting trust."

New Hampshire.

In Wood *vs.* Cheshire, 32 N. H., 421.

The heirs at law of a grantor sued out a writ of entry to recover premises granted for the purpose of erecting a courthouse thereon and for no other purpose, to have and hold the said premises "So long as the building thereon is occupied as a courthouse and no longer." There was no clause of re-entry in the deed. The court held that the estate was an estate upon a conditional limitation, and that as the lot had been abandoned the writ might be maintained.

CONNECTICUT.

In Scoville *vs.* McMahon, 62 Conn., 378.

Where a conveyance contained a clause providing that the land should be used for a cemetery and for no other purpose the court held that the conveyance was upon a condition subsequent.

MARYLAND.

In Reed *et al. vs.* Stauffer, 56 Md., 237 (1881).

A conveyance was made to trustees as a burial ground, "In trust nevertheless, and for the uses, intents, and purposes hereinafter mentioned and to and for no other use, intent, and purpose whatsoever." Two bills in equity were filed, one by the trustee for specific performance of the conveyance and one by the heirs at law of the grantor, alleging that the property could not be used for a burial ground, being within the limits of the city, and asking to have the property reconveyed to them. The court held that the lot might still be used as a burial ground, but that it must be in strict conformity with the terms of the deed, as any diversion from those uses would reinvest the grantor's heirs with the title.

In 2nd Universalist Society *vs.* Dugan, 65 Md., 460.

Which was a bill for specific performance of a contract for the sale of land, where the defendant alleged that the plaintiff who held title as trustees for the use of the Quakers about Baltimore and to and for no other use, intent, and purpose whatsoever, could not make a good title, the bill was dismissed. Irving, J.: "The uses are clearly and distinctly set forth, and in one of them (speaking of the deed) the words, "and for no other use whatsoever," are added, thereby expressly excluding the idea that a larger estate was intended to be granted.

INDIANA.

In Scott *vs.* Stipe, 12 Ind., 74.

In a grant to trustees of a certain church for the erection of a church, to be forever thereafter used as a house of worship,

and the church conveyed the land in fee, the heirs of the grantor commenced an action to recover the land, and it was held that the trustees had no power to sell the lot. Perkins, J.: "The misappropriation of the property granted—its diversion to secular uses—was a breach of the condition, and the breach of the condition worked a forfeiture of the estate and rendered it subject to be recovered back by the grantor or his heirs in a suit at law or in equity. The condition broken gave the right of re-entry."

In The I. P. & C. R. R. Co. *vs.* Hood, 66 Ind., 581.

Where land was conveyed to the railroad company "for and in consideration of the permanent location and construction of a depot for said railroad thereon," and the depot was constructed upon said property, but subsequently removed, it was held in a suit by the heirs of the grantor that the removal constituted a breach of the implied condition subsequent contained in the deed, and that the real estate therefore reverted to the grantor.

ILLINOIS.

In Mott *vs.* Danville Seminary, 129 Ill., 405.

Where a conveyance was made to trustees for building and maintaining on the ground an institution of learning, as provided by the Act of 1849, it was held that the deed was made upon a condition subsequent that the board should maintain upon the land an institution of learning, and that the land did not revest in the grantor or his heirs until election by them, shown by re-entry or some equivalent act.

In none of the above cases were there clauses of re-entry.